

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

INTEGRATED HEALTH PROFESSIONALS,
INC.,

Plaintiff,

v.

PHARMACISTS MUTUAL INSURANCE CO.,

Defendant.

No. CV-05-101-FVS

ORDER

THIS MATTER came before the Court on based upon the parties' cross motions for summary judgment. The plaintiff was represented by Christopher J. Kerley and James B. King. The defendant was represented by Christopher W. Tompkins.

BACKGROUND

Integrated Health Professionals, Inc. ("Integrated"), is a Washington corporation that provides health care services to persons in their homes. At one time, Raymond Hughes worked for Integrated. He provided in-home services to Sara Hendershott, a minor who suffers from cerebral palsy and respiratory disease. On or about April 20, 2004, Mr. Hughes molested Sara in her home while working for Integrated. Sara's mother brought an action against Integrated on her behalf. Integrated tendered the claims to Pharmacists Mutual Insurance Company ("Pharmacists Mutual"), which had sold Integrated both a "Business Owner's Liability Policy" and an endorsement adding coverage for "Home Health Care Services." In a letter dated February

1 7, 2005, Pharmacists Mutual refused to provide a defense against Miss
2 Hendershott's claims or to indemnify Integrated in the event she
3 obtains a judgment. Consequently, Integrated commenced this action,
4 seeking declaratory relief and damages. Since Pharmacists Mutual is
5 an Iowa corporation, diversity jurisdiction exists. 28 U.S.C. §
6 1332.

7 The parties have filed cross motions for summary judgment with
8 respect to coverage. Fed.R.Civ.P. 56.¹ During oral argument,
9 counsel agreed that Miss Hendershott's claims are covered by the
10 "Home Health Care Services" endorsement unless coverage is eliminated
11 by Exclusion No. 1. This provision excludes coverage for "the
12 willful violation of statute, ordinance, or regulation relating to
13 Home Health Care Services by . . . an insured." (Emphasis omitted.)
14 The term "'insured'" is defined, in part, to include "'your'
15 employees' . . . for acts *within the scope of their employment* by
16 'you[.]'" (Emphasis added.) Given these definitions, the pivotal
17 issue is whether Mr. Hughes' acts of sexual abuse were within the
18 scope of his employment. If so, he was an "insured" when he
19 committed them. If he was an insured, Miss Hendershott's claims
20 arise out of an insured's willful violation of the law of the State
21 of Washington. In that event, Exclusion No. 1 eliminates whatever
22 coverage the Home Health Care Services endorsement provides.
23 However, if Mr. Hughes' acts of sexual abuse were not within the
24 scope of his employment, he was not an insured when he committed
25 them. In that event, Miss Hendershott's claims do not arise out of

26 ¹Procedural matters are governed by the Federal Rules of
Civil Procedure; substantive matters are governed by the law of
the State of Washington. See *Gasperini v. Ctr. for Humanities,*
Inc., 518 U.S. 415, 427, 116 S.Ct. 2211, 2219, 135 L.Ed.2d 659
(1996).

1 an insured's willful violations of state law and Exclusion No. 1 does
2 not apply. If so, Miss Hendershott's claims are covered by the
3 endorsement.

4 **RULING**

5 The term "scope of employment" occurs repeatedly in discussions
6 of vicarious liability; so much so that the Supreme Court has
7 described it as a "term of art." *Community for Creative Non-Violence*
8 *v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 2172-73, 104 L.Ed.2d 811
9 (1989). Unsurprisingly, courts have relied routinely upon agency law
10 when interpreting insurance policies. *See, e.g., National Union Fire*
11 *Ins. Co. of Pittsburgh, Pa. v. Northwest Youth Services*, 97 Wn. App.
12 226, 230-34, 983 P.2d 1144 (1999) ("*National Union*"), review denied,
13 139 Wn.2d 1020, 994 P.2d 845 (2000). Pharmacists Mutual insists
14 that, even if the practice is unsurprising and routine, it is
15 inappropriate. To rely upon principles of *respondeat superior*, says
16 Pharmacists Mutual, is to confuse an agency question (*i.e.*, the
17 extent of an employer's liability for the acts of an employee) with
18 an insurance question (the proper interpretation of a term within an
19 insurance contract). As authority, Pharmacists Mutual cites *All*
20 *American Insurance Co. v. Burns*, 971 F.2d 438 (10th Cir.1992)
21 (hereinafter "*Burns*"), a diversity case. In *Burns*, a person who
22 served as a volunteer bus driver for a church molested two children
23 whom he had come to know in his capacity as a bus driver. *See id.* at
24 440. The church's insurance policy contained an exclusion for
25 "personal injury arising out of the willful violation of a penal
26 statute . . . committed by . . . any insured[.]" *Id.* at 445
(emphasis in original). The term "insured" was defined, in part, as
a "volunteer who is duly appointed or elected; but only while acting
in the scope of his duty as such in relation to the *named insured*."

1 *Id.* (emphasis in original). Applying Oklahoma law, the Tenth Circuit
2 declined to rely upon principles of *respondeat superior* for its
3 interpretation of the term "acting in the scope of his duty." *Id.*
4 Instead, the Tenth Circuit attempted to determine the "'plain,
5 ordinary and popular' meaning" of this clause. *Id.* Since the bus
6 driver's "criminal acts occurred while he was performing the very
7 task he was directed by the church to perform," he was, in the
8 opinion of the Tenth Circuit, acting in the scope of his duty. *Id.*
9 Pharmacists Mutual urges the Court to follow *Burns* and rule that Mr.
10 Hughes was acting within the scope of his employment when he molested
11 Sara Hendershott. This would mean Mr. Hughes is an insured under the
policy.

12 Integrated argues that the position Pharmacists is now taking --
13 *i.e.*, that Mr. Hughes qualifies as an "insured" -- is inconsistent
14 with the position that Don R. McGuire took on behalf of Pharmacists
15 Mutual in his letter of February 7, 2005. In denying coverage, Mr.
16 McGuire wrote, "Hughes . . . is not an insured within the meaning of
17 the PHMIC policy." (Letter of Don R. McGuire, at 4.) Integrated
18 argues that Pharmacists Mutual should be estopped from changing its
19 position on this issue. *Cf. Humetrix, Inc. v. Gemplus S.C.A.*, 268
20 F.3d 910, 918 (9th Cir.2001) ("'equitable estoppel is used to bar a
21 party from raising a defense or objection it otherwise would have'"
22 (quoting *Jablon v. United States*, 657 F.2d 1064, 1068 (9th
23 Cir.1981))). There are three reasons why Integrated's argument is
unpersuasive.

24 Integrated was on notice of Pharmacists Mutual's present
25 interpretation of the policy as early as the date upon which
26 Pharmacists Mutual filed its answer. Pharmacists Mutual clearly
alleged that Mr. Hughes is an insured under the policy. Despite

1 notice, Integrated did not seek to amend its complaint to assert
2 equitable estoppel. Nor did Integrated raise the issue in the papers
3 it submitted in support of its motion for summary judgment and in
4 opposition to Pharmacists Mutual's summary judgment motion. It was
5 not until oral argument that Integrated objected to Pharmacists
6 Mutual's alleged change of position. By waiting as long as it did,
7 Integrated waived the objection. *But cf. Magana v. Commonwealth of*
8 *the Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997)
9 ("defendants may raise an affirmative defense for the first time in a
10 motion for summary judgment only if the delay does not prejudice the
11 plaintiff").

12 In addition, Mr. McGuire's letter of February 7, 2005, is
13 somewhat equivocal. Concerning Mr. Hughes' status under the policy,
14 Mr. McGuire wrote, "Because he is not an insured . . . for purposes
15 of the events giving rise to this claim, Hughes is not entitled to
16 any defense or indemnification . . . to the extent . . . [the
17 complaint] can be construed as asserting a claim directly against
18 him." (Letter of Don R. McGuire, at 4.) But this statement was not
19 the end of the matter. Later, when discussing Exclusion No. 1 to the
20 endorsement for "Home Health Care Services," Mr. McGuire assumed Mr.
21 Hughes is an insured. *Id.* at 5-6. As a result, Pharmacists Mutual's
22 change of position is not as dramatic as Integrated suggests.

23 Finally, Integrated has failed to establish at least one of the
24 elements of estoppel. In the State of Washington, an insurer may not
25 change its position once an action has been commenced if the insured
26 will suffer prejudice as a result. *Bosko v. Pitts & Still, Inc.*, 75
Wn.2d 856, 454 P.2d 229 (1969). Conversely, an insurer may change
its position as long as it acts in good faith and the insured does
not suffer prejudice. *Hayden v. Mutual of Enumclaw Ins. Co.*, 141

1 Wn.2d 55, 63, 1 P.3d 1167 (2000); *Rizzuti v. Basin Trave Serv. of*
2 *Othello, Inc.*, 125 Wn. App. 602, 613-14, 105 P.3d 1012 (2005); *James*
3 *E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co.*, 118 Wn. App.
4 12, 20, 74 P.3d 648 (2003), *review denied*, 151 Wn.2d 1010, 89 P.3d
5 712 (2004). Integrated has not presented evidence of prejudice or
6 bad faith. Thus, Pharmacists Mutual is entitled to argue that Mr.
7 Hughes is an insured.²

8 Whether Pharmacists Mutual is correct is another matter. Mr.
9 Hughes qualifies as an insured only if his acts of sexual abuse were
10 within the scope of his employment. The Court must determine how the
11 Supreme Court of the State of Washington would resolve this issue.
12 See *Ticknor v. Choice Hotels International, Inc.*, 265 F.3d 931, 939
13 (9th Cir.2001) ("The task of a federal court in a diversity action
14 is to approximate state law as closely as possible in order to make
15 sure that the vindication of the state right is without
16 discrimination because of the federal forum.'" (quoting *Gee v.*
17 *Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir.1980))).

18 The Washington Supreme Court has developed rules for
19 interpreting insurance contracts. Where, as here, a disputed term is
20 not defined by the contract, a court's task is to determine its
21 "plain, ordinary and popular meaning." *Stuart v. American States*
22 *Ins. Co.*, 134 Wn.2d 814, 820, 953 P.2d 462 (1998) (internal

23 ²After oral argument, the Court invited the parties to
24 submit supplemental memoranda concerning the "mend the hold"
25 doctrine. See, e.g., *Utica Mut. Ins. Co. v. Vigo Coal Co.*, 393
26 F.3d 707, 716 (7th Cir.2004) ("The doctrine of 'mend the hold'
forbids a contract party, particularly when it is an insurance
company, to change its position on the meaning of the contract in
the middle of litigation over it."). In view of *Bosko* and its
progeny, it is unclear whether the Supreme Court of the State of
Washington would see a need to adopt the "mend the hold"
doctrine.

1 punctuation and citations omitted). In doing so, the court may
2 consider standard English-language dictionaries, legal dictionaries,
3 and Washington appellate decisions. See *id.* at 820-21.

4 No standard dictionary of which this Court is aware defines the
5 term "scope of employment," much less provides a definition that is
6 broader than the one provided by legal dictionaries. Faced with this
7 circumstance, Pharmacists Mutual has dissected the term "scope of
8 employment," and then turned to a standard dictionary for definitions
9 of the words "scope" and "employment." Utilizing these definitions,
10 Pharmacists Mutual has attempted to construct a plain, ordinary and
11 popular definition that is broader than the agency-law definition.
12 *Cf. Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d
13 507 (1990) (if a disputed term has both a legal, technical meaning
14 and a plain, ordinary, and popular meaning, the latter governs unless
15 both parties to the contract clearly intended the former to govern).

16 The process of dissection and definition is warranted when a
17 disputed term is a multi-word term for which no definition can be
18 found in a dictionary. See, e.g., *Stuart*, 134 Wn.2d at 821
19 ("business pursuit"). This is not such a case. While one may not be
20 able to find a definition of the term "scope of employment" in a
21 standard dictionary, one can find a definition in a legal dictionary.
22 See, e.g., *Black's Law Dictionary* 1374 (8th ed.2004). Which raises
23 an important question. If one can locate a definition for a disputed
24 term in a legal dictionary, but one cannot locate a definition in a
25 standard dictionary, does the disputed term actually have a plain,
26 ordinary and popular meaning?

Washington appellate courts have never suggested that the term
"scope of employment" has one meaning when resolving a dispute
concerning vicarious liability and another when resolving a dispute

1 concerning the extent of insurance coverage. To the contrary,
2 Washington appellate courts have held repeatedly that a finding in a
3 tort action with respect to whether an employee was acting within the
4 scope of his employment cannot be relitigated in a subsequent
5 contract action in which the existence of insurance coverage is
6 contested. See, e.g., *Foote v. Grant*, 56 Wn.2d 630, 632, 354 P.2d
7 893 (1960); *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 572,
8 320 P.2d 311 (1958); *National Union*, 97 Wn. App. at 232-34; *Moritz v.*
9 *St. Paul Fire & Marine Ins. Co.*, 48 Wn. App. 521, 526-27, 739 P.2d
10 731 (1987). These holdings clearly imply that unless an insurance
11 policy actually defines the term "scope of employment" more broadly
12 than its agency-law definition, the agency-law definition should be
13 applied when interpreting the policy. This is entirely consistent
14 with *Boeing*, which, as indicated above, stands for the proposition
15 that an insurer may not rely upon a term's narrow, legal meaning to
16 avoid coverage when coverage would exist were the term given its
17 plain, ordinary and popular meaning. 113 Wn.2d at 882. Here, unlike
18 *Boeing*, it does not appear that the disputed term has a plain,
19 ordinary and popular meaning. So far, the only meaning that has been
20 recognized by Washington appellate courts is the agency-law meaning.

21 The Tenth Circuit has determined that the Supreme Court of the
22 State of Oklahoma would adopt a broader definition. However, it is
23 necessary to consider the Tenth Circuit's rationale. In part, the
24 Tenth Circuit ruled as it did to avoid nullifying "the penal
25 violation exclusion [in the policy before it] by incorporating the
26 respondeat superior tests and holding that a servant at the time of
an assault was not acting within the scope of his employment." 971
F.2d at 445-46 (citation omitted). It is doubtful the Washington
Supreme Court would attach as much weight to this consideration. In

1 Washington, exclusions in insurance policies are construed strictly
2 against the insurer, especially if ambiguous. See, e.g., *Stuart*, 134
3 Wn.2d at 819; *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 374,
4 917 P.2d 116 (1996); *Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836,
5 841, 734 P.2d 17 (1987).

6 Given the preceding analysis, perhaps the most appropriate
7 conclusion is that term "scope of their employment" is ambiguous.
8 Mr. McGuire's response suggests as much. In his letter of February
9 7th, he stated that Mr. Hughes' acts were not within the scope of his
10 employment. Later, Mr. McGuire changed his mind. His uncertainty
11 indicates the disputed term is fairly susceptible of two different
12 but reasonable interpretations. That being so, the term is
13 ambiguous, *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d
14 1244 (1997), and the ambiguity must be resolved in favor of
15 Integrated. *Id.*

16 The term "scope of employment" has a well-established meaning
17 within the field of agency law. "The test for determining whether an
18 employee is, at a given time, in the course of his employment, is
19 whether the employee was, at the time, engaged in the performance of
20 the duties required of him by his contract of employment or by the
21 specific direction of his employer, or, as sometimes stated, whether
22 he was engaged at the time in the furtherance of the employer's
23 interests." *McGrail v. Dep't of Labor & Indus.*, 190 Wash. 272, 277,
24 67 P.2d 851 (1937). Washington appellate courts continue to apply
25 this test. See, e.g., *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14
26 P.3d 897 (2001). In the State of Washington, an employer who
provides care to disabled clients may not be held vicariously liable
in the event one of its employees assaults a disabled client. See
Niece v. Elmview Group Home, 131 Wn.2d 39, 55-6, 929 P.2d 420 (1997);

1 see also *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d
2 699, 719, 985 P.2d 262 (1999) (holding that Catholic diocese could
3 not be held vicariously liable for sexual misconduct by priests). It
4 follows that Mr. Hughes' acts of sexual abuse were not within the
5 scope of his employment and that he is not an "insured" within the
6 meaning of the policy. Since he is not an insured, Exclusion No. 1
7 to the endorsement for "Home Health Care Services" does not apply.
8 Miss Hendershott's claims against Integrated are covered by the
9 endorsement.

10 **IT IS HEREBY ORDERED:**

11 1. The cross motion for summary judgment filed by Pharmacists
12 Mutual Insurance Company (**Ct. Rec. 19**) is denied.

13 2. The motion for summary judgment filed by Integrated Health
14 Professionals, Inc. (**Ct. Rec. 12**) is granted to the extent indicated
15 above.

16 **IT IS SO ORDERED.** The District Court Executive is hereby
17 directed to enter this order and furnish copies to counsel.

18 **DATED** this 21st day of March, 2006.

19 s/Fred Van Sickle
Fred Van Sickle
United States District Judge